

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 WILLARD STEWART, :
4 Petitioner :
5 v. : No. 03-814
6 DUTRA CONSTRUCTION COMPANY. :
7 - - - - -X
8 Washington, D.C.
9 Monday, November 1, 2004
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:01 a.m.
13 APPEARANCES:
14 DAVID B. KAPLAN, ESQ., Boston, Massachusetts; on behalf of
15 the Petitioner.
16 LISA S. BLATT, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the United States, as amicus curiae, supporting the
19 Petitioner.
20 FREDERICK E. CONNELLY, JR., ESQ., Boston, Massachusetts;
21 on behalf of the Respondent.
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4	On behalf of the Petitioner	3
5	LISA S. BLATT, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioner	20
8	FREDERICK E. CONNELLY, JR., ESQ.	
9	On behalf of the Respondent	31
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P R O C E E D I N G S

(11:01 a.m.)

JUSTICE STEVENS: Mr. Kaplan, you may proceed.

ORAL ARGUMENT OF DAVID B. KAPLAN

ON BEHALF OF THE PETITIONER

MR. KAPLAN: Justice Stevens, and may it please
the Court:

I received word that the Court is interested in
46 U.S.C. 801, and I intend to focus my attention on that
before I get into my argument.

46-801 is referred to as the Shipping Act, and
it was enacted in 1916 and the amendment in 1918. At that
time, the United States Government was involved in a war
and we were interested in developing the merchant marine
for purposes of transporting cargo, equipment, and people
back and forth. And so the amendment that was filed was
fashioned after exactly 1 U.S.C. 3, but it had some
additional features involved, one of which was that a
vessel that was under construction was included as part of
the act, one of which was if the owner intended to use the
vessel for transportation, it was included. It is under
no circumstances affecting a Jones Act claim because the
Jones Act requires, number one, a vessel in navigation and
it can't be on the dock or being under construction, and
if it was under construction, it wouldn't have a crew.

1 So under the circumstances, with all due
2 respect, it is our judgment that we -- we would win on
3 both sides. The Super Scoop would indeed, qualify under
4 that act as well as under 1 U.S.C. 3. But we think that
5 this goes a little too far and not appropriate.

6 JUSTICE O'CONNOR: Is the Super Scoop
7 practically capable of transportation on water, counsel?

8 MR. KAPLAN: It is more than practically
9 capable, it actually is -- actually transports its
10 equipment and its personnel at work and its --

11 JUSTICE KENNEDY: Didn't it come from the west
12 -- did it come from the west coast originally?

13 MR. KAPLAN: Indeed, it did. It came through
14 the west coast, unmarried, however. It came from the west
15 coast through Panama, through the Gulf, up the east coast,
16 and, sir, if anything had occurred on that trip, that --
17 that would have been considered a vessel. However, when
18 it came in to Boston --

19 JUSTICE GINSBURG: But there was nobody on it in
20 that trip.

21 MR. KAPLAN: Sorry.

22 JUSTICE GINSBURG: There was nobody -- there was
23 no one on it --

24 MR. KAPLAN: In fact, it's unmanned.

25 JUSTICE GINSBURG: -- to be injured.

1 MR. KAPLAN: There was nobody injured and
2 unmanned, yes, indeed.

3 But what -- what I'm saying is historically
4 there has never been a decision in which a dredge was not
5 considered a vessel until this case that we appear here
6 now.

7 Of course, I'm here to seek to have you overrule
8 the decision that was rendered. But more importantly, we
9 are having a morass in the lower courts, and I'm here to
10 try and persuade this Court to establish, once and for
11 all, that there is a standard, that there is a definition
12 for the use of the word vessel under the Jones Act.

13 Now, in 1920, when the Jones Act was enacted,
14 there was no reference to the use of the word vessel, and
15 we know that when that happens, we have to seek to find
16 what was the meaning, what was the established meaning at
17 that time. And the way we do that is to look first to
18 statutory law, and in addition we look to case law.

19 The statutory law is clear. In 1873 in the
20 revised statutes it makes it very clear that section 3
21 describes a vessel is any watercraft that -- or other
22 artificial contrivance used, or capable of being used, for
23 transportation on water. With that standard in 1873, this
24 Court in 1907 tried the case of *Ellis v. the United States*
25 and did apply that revised statute and decided that the

1 dredges that were working in the city of -- in the Boston
2 Harbor were indeed vessels and that the --

3 JUSTICE SCALIA: Well, now, that -- that
4 definition, used or capable of being used -- right, now.

5 After one of the hurricanes, I saw a -- a
6 tugboat that had just been washed up on shore down in the
7 Gulf. What if somebody -- some enterprising person had
8 fitted that out like a -- like a diner, you know, a -- a
9 restaurant and they have staff in the diner and they're
10 serving the meals off of this boat? Now, the boat, apart
11 from the fact that it's a couple of hundred yards inland,
12 is capable of being -- still capable of being used. Are
13 the employees of that diner covered by the Jones Act?

14 MR. KAPLAN: Very interesting question, Justice
15 Scalia. However, this Court --

16 JUSTICE SCALIA: It -- it goes to whether we
17 want to use, you know, section 3 as -- as our definition.

18 MR. KAPLAN: This Court seemed to have focused
19 right on point in the cases of Cope in -- Cope was early,
20 1903, and in the case of Evansville in 1926 when they
21 added the two words, practically capable. The Cope case
22 was a drydock and it was run into by somebody and they
23 sought damages. And the Court -- this Court said, wait a
24 minute. In that case, that's a drydock. It goes up and
25 down. It doesn't navigate. It doesn't transport people

1 or cargo over water. So they said it's not practically
2 capable of fulfilling under the revised statute.

3 The easiest case is 1926 when this Court again
4 in Evansville made it very clear that a wharfboat, which
5 on occasion was taken out. Once a year, I think the
6 evidence is, they would take it out and move it back. But
7 it was affixed to the land. It had its telephone. It had
8 its sewage. It had all connections to the land. And this
9 Court again used 1 U.S.C. 3, but did say that it wasn't
10 practically capable of performing.

11 JUSTICE O'CONNOR: Is that what we would say
12 about all these gambling casino boats that are parked on
13 the side of the Mississippi River?

14 MR. KAPLAN: Your Honor, these are a problematic
15 case, and the whole thing is determined on whether or not
16 it's in navigation. If a vessel is --

17 JUSTICE O'CONNOR: What's your answer? There
18 are lots of these gambling boats that are parked --

19 MR. KAPLAN: If the --

20 JUSTICE O'CONNOR: -- along the side of the
21 river.

22 MR. KAPLAN: If the gambling boat has lost its
23 ability to be in navigation, if it's affixed to the land,
24 if it has connections to the land, if it doesn't expect to
25 go into navigation, it is out of navigation. It's owner

1 has taken that vessel from a navigable vessel into out of
2 navigation.

3 JUSTICE KENNEDY: And then what is the standard
4 you use, the definition to use to get to that result? Is
5 this your practically point again?

6 MR. KAPLAN: Say that again, please.

7 JUSTICE KENNEDY: You've given us the answer.
8 What's the standard that you use to get to that answer?
9 Do you go back to the definition that it -- it cannot
10 practicably be used?

11 MR. KAPLAN: Well, the standard that I'm seeking
12 to have the Court employ is 1 U.S.C., section 3, which
13 says, any -- a vessel is any watercraft or other
14 artificial contrivance used, or capable of being used --

15 JUSTICE KENNEDY: And then -- and then the
16 riverboat -- it depends on how -- how permanently it's
17 affixed to the land. Suppose it stays there for 10 years.
18 It -- it can go anytime, but it stays there for 10 years.

19 MR. KAPLAN: If in fact it stays there for 10
20 years and it does not move, that's evidence that the owner
21 intended that vessel to lose its position in navigation.

22 JUSTICE KENNEDY: So there's an intent component
23 to your test now?

24 MR. KAPLAN: There -- there -- technically one
25 could say break the bonds that hold it to the dock and

1 then take it out and use it because once a vessel, always
2 a vessel? The answer is no. According to this Court,
3 this Court said --

4 JUSTICE GINSBURG: Mr. Kaplan?

5 MR. KAPLAN: -- when it's not practically
6 capable of doing it.

7 JUSTICE GINSBURG: Mr. Kaplan, you said two
8 things and I -- I'm wondering these are separate or
9 they're really one concept. I thought your answer was
10 going to be to the boat that is used as a diner or to the
11 casino that's tied up to the land, that it's not in
12 navigation. It may satisfy the 1 U.S.C. definition of
13 vessel, but it has to be in navigation to be covered by
14 the Jones Act. So I thought that's what you would --
15 something is taken out of navigation would not qualify.

16 MR. KAPLAN: The answer is no. It -- it does
17 not qualify if it's removed from navigation. Once the
18 vessel is taken out of navigation, as in Justice Scalia's
19 situation where that vessel is on the land, it is being
20 used as a completely different --

21 JUSTICE SCALIA: So you say it is a vessel. I
22 thought your answer before was that it was not a vessel
23 because it's not practically capable of being used.

24 MR. KAPLAN: I say it's not a vessel. It's out
25 of navigation.

1 JUSTICE SCALIA: I -- I like Justice Ginsburg's
2 answer better.

3 (Laughter.)

4 JUSTICE SCALIA: It is a vessel but it's not in
5 navigation. Then you could stick with the -- with the
6 section 3 definition. It's capable of being used, so it's
7 a vessel, but it's not --

8 JUSTICE KENNEDY: But then the question is
9 whether or not it's in navigation at the time of the
10 accident.

11 MR. KAPLAN: And that only applies --

12 JUSTICE KENNEDY: And -- and that is a rule
13 that, I take it, you do not wish us to adopt, or maybe you
14 do.

15 MR. KAPLAN: I'm trying to establish that if
16 it's in navigation, then it is a vessel. If the owner of
17 that vessel removed it from any chance of navigation, made
18 it a different kind of a vessel, it is no longer in
19 navigation. It remains a vessel, but it's not a vessel in
20 navigation.

21 JUSTICE SOUTER: No, but doesn't -- doesn't that
22 put you right back in the problem, the original problem,
23 with -- with the riverboat? If all it is is tied up, it
24 isn't permanently taken out of navigation. It isn't
25 precluded. All they've got to do is cast the lines off

1 and it's out in the water so that the riverboat is the
2 vessel and presumably we've got seamen working on it.

3 MR. KAPLAN: Justice Souter, if on that
4 situation where all they have to do is cast the lines off
5 and go out to sea, then of course it remains a vessel, and
6 it remains in navigation. And it is -- it fits all the
7 elements of the requirements. But if that --

8 JUSTICE SOUTER: So you're saying -- and I -- I
9 don't mean to disagree with you. You're saying, yes,
10 there are going to be a few tough results under this
11 definition.

12 MR. KAPLAN: There may be, but there's got to be
13 some practically capable influence that this Court has
14 already focused on to say whether that particular vessel
15 is practically capable of being in navigation. If it's
16 out of navigation, it's never going to be back in
17 navigation, and there's nothing more that's going to
18 happen to that as a vessel, then of course it's no longer
19 a vessel that would qualify.

20 JUSTICE BREYER: So -- so what is -- I see the
21 First Circuit as trying to grapple with the very question
22 you're raising, which is I think difficult.

23 MR. KAPLAN: Yes.

24 JUSTICE BREYER: Of course, it seems to me fine,
25 let section 3 apply. No problem so far with me. But that

1 is so broadly stated that if you read it literally, my
2 garage door is a boat or a vessel because, after all, it's
3 capable of being used in navigation, if worst came to
4 worst. And now you're trying to narrow it to get out of
5 that absurd result. Well, so did the First Circuit.
6 That's what they were trying to do, and you got caught up
7 in it.

8 But that's -- so -- so what -- that's why I
9 think we're struggling with the words, and -- and perhaps
10 practically -- if you mean by practically that it is not
11 practically capable of navigation, even though it really
12 is, if it just hasn't been used for navigation for a long,
13 long time and has connections to the land like Jimmy's
14 Harborside probably or -- or --

15 MR. KAPLAN: Like the establishments from the --

16 JUSTICE BREYER: What?

17 MR. KAPLAN: -- pier 4, yes.

18 JUSTICE BREYER: Yes, yes, or one like that.

19 But is -- are those the words? Do we need some
20 other words as well? We say practically capable but
21 practically capable has a technical meaning here that it
22 means if there's close to permanent connection to the
23 land, it doesn't apply?

24 MR. KAPLAN: Justice Breyer, we're talking
25 primarily of Jones Act.

1 JUSTICE BREYER: Yes.

2 MR. KAPLAN: Jones Act requires a relationship
3 between the worker and the vessel. So --

4 JUSTICE BREYER: So could we say -- could we say
5 that, as well, it must be unlike my garage door? A, it
6 must be a -- a structure that normally would have a crew
7 or that -- a significant amount of the time. We would
8 have a connection to the water. It would be capable of
9 having a master or crew. What about that?

10 MR. KAPLAN: This Court has already
11 established --

12 JUSTICE BREYER: Yes.

13 MR. KAPLAN: -- what the standards are for Jones
14 Act, whether a person qualifies. There are filters
15 between whether a person is a Jones Act seaman or not.
16 For example, there has to be a vessel. There has to be a
17 vessel in navigation. There has to be a economic
18 relationship between the worker and his vessel and he has
19 to contribute towards the mission or to the function of
20 that vessel. He has to, more importantly, have a
21 substantial relationship to his vessel, both with respect
22 to duration and with respect to nature.

23 JUSTICE SOUTER: When you say the function of
24 the vessel, do you mean the function of the vessel in its
25 transportation function?

1 MR. KAPLAN: Yes.

2 JUSTICE SOUTER: So that would be the answer to
3 the riverboat problem. You'd say sure, if the -- if the
4 riverboat is capable simply of being let go in the water
5 by casting off lines, the riverboat is a vessel. But you
6 don't have to worry about turning all the -- the croupiers
7 and the waiters into seamen because they're not
8 contributing to the transportation function of the vessel.

9 MR. KAPLAN: Precisely.

10 JUSTICE SOUTER: I mean, is that the way out of
11 the problem?

12 JUSTICE SCALIA: Precisely? So then the --

13 MR. KAPLAN: There is a safeguard between the
14 vessel and whether a person qualifies as a Jones Act
15 seaman on that vessel.

16 JUSTICE SCALIA: So you -- you think that the
17 person who operates the dredge, since he's not navigating
18 the vessel, is not covered by the Jones Act?

19 MR. KAPLAN: Oh, I do not. I do not, indeed. I
20 say --

21 JUSTICE SCALIA: You do not what? Do not think
22 he's covered by the Jones Act?

23 MR. KAPLAN: I say he's covered by the --

24 JUSTICE SCALIA: He is covered. Well, then why
25 isn't the croupier covered?

1 MR. KAPLAN: Why isn't what?

2 JUSTICE SCALIA: Why isn't the croupier covered,
3 you know?

4 MR. KAPLAN: Is the croupier contributing to the
5 function of the vessel?

6 JUSTICE SCALIA: That vessel's function is
7 gambling. He sure is.

8 MR. KAPLAN: It is.

9 JUSTICE SOUTER: Does -- look, does the -- does
10 the person in charge of the dredge control this process of
11 pulling against anchor lines that moves it 8 feet or
12 whatever it is?

13 MR. KAPLAN: The manner in which the dredge --
14 this dredge worked -- by the way --

15 JUSTICE SOUTER: No, but if you can give me a
16 yes or no answer, give me a yes or no answer.

17 MR. KAPLAN: Yes.

18 JUSTICE SOUTER: Okay.

19 MR. KAPLAN: That man controls not only --

20 JUSTICE SOUTER: So that's why he's different
21 from the croupier then, isn't he?

22 MR. KAPLAN: The croupier does not control
23 the motion.

24 JUSTICE SOUTER: Right, and the -- the guy in
25 charge of the dredge does control the movement of it.

1 MR. KAPLAN: Absolutely.

2 JUSTICE SCALIA: What if you have a very
3 complicated dredge and it takes two people? One of them
4 does nothing but -- but operate the steam shovel that
5 pulls up the goop and puts it in the -- in the barges.
6 Okay? And the other one moves the dredge. You say the
7 one is -- is covered by the Jones Act and the other one
8 isn't? No, it can't be. If the function of the vessel is
9 dredging, anybody who is performing that function of
10 dredging is covered by the Jones Act. Don't you believe
11 that?

12 MR. KAPLAN: I do believe that.

13 JUSTICE SCALIA: Of course, you do. So the
14 croupier is --

15 (Laughter.)

16 JUSTICE SOUTER: Then what do you -- then what
17 do you do with the croupier? You can't have it both ways.

18 MR. KAPLAN: Well, if the croupier is
19 participating in the navigation of the vessel, we don't
20 care anymore.

21 JUSTICE SOUTER: He's not participating in the
22 navigation of the vessel.

23 MR. KAPLAN: Well --

24 JUSTICE SOUTER: He's doing whatever croupiers
25 do. I don't know.

1 (Laughter.)

2 JUSTICE SOUTER: No, but --

3 MR. KAPLAN: They don't hand me any money, I'll
4 tell you.

5 What I'm trying to establish here is that there
6 really is a distinction between the law applicable to
7 whether or not there is a vessel, and I'm suggesting that
8 1 U.S.C. clearly describes what a vessel is and should be
9 for Jones Act purposes.

10 The second part of the issue is whether or not
11 the individual qualifies and is warranted to have the
12 Jones Act coverage. So as to the vessel -- as to this
13 coverage, we know, through Wilander and through Chandris,
14 this Court has established some very sensible and good
15 standards by which a person can or cannot be a -- a Jones
16 Act seaman.

17 Now the only thing that's necessary is we have
18 to round the circle up to determine what is a vessel for
19 Jones Act purposes. 1 U.S.C. seems to satisfy it.

20 It's important to note that in this particular
21 case this is a Coast Guard-certified, inspected vessel.
22 This vessel is -- carries -- it has a 1290 ton itself and
23 it carries cargo of 466 ton. It is -- it has navigation
24 lights. It has to be ballasted. It has to be load-lined.
25 When it goes to work, the way in which it moves is as

1 follows. The tugs take the anchors out 50 feet. Now, as
2 the operator is using that bucket to dump into the scows,
3 he's also handling the -- the vessel is also moving
4 through its own deck winches. They spool up on their own
5 winches. So in addition to where he's digging, they're
6 also moving so that instead of just digging a hole,
7 they're digging the trench.

8 So under all the circumstances, this Super
9 Scoop, because it has a crew, a captain and a crew of 10,
10 because they have to wear lifesaving devices, because they
11 have a -- a standby vessel for safety purposes right there
12 by order of the Coast Guard, because it is exposed to all
13 the weather and navigation problems that exist in the --
14 in Boston Harbor, because the risks are inherent in this
15 kind of work, this man qualifies as not only a vessel but
16 as a Jones Act seaman.

17 JUSTICE GINSBURG: Is the scow a vessel too?

18 MR. KAPLAN: I'm sorry. I didn't hear you.

19 JUSTICE GINSBURG: The scow. The --

20 MR. KAPLAN: Oh, the scow.

21 JUSTICE SCALIA: That's easy.

22 MR. KAPLAN: Well, what happened in this one, if
23 Your Honor please, is when -- this was a collision at sea.
24 Client was aboard the scow when it collided with the Super
25 Scoop and he was tossed down a 10-foot --

1 JUSTICE GINSBURG: I know the circumstances of
2 the accident. And you're -- you're discussing whether
3 Super Scoop was a vessel. I'm asking if the scow where
4 the injury occurred is a vessel.

5 MR. KAPLAN: Oh, indeed. The scow is -- is what
6 they put the fill in, and as differentiated from a barge,
7 a scow has the ability to open up its bottom to let all
8 the fill out when they get out to sea.

9 JUSTICE STEVENS: Yes, but you haven't told us
10 whether you think it was a vessel or not.

11 MR. KAPLAN: Pardon?

12 JUSTICE STEVENS: Was -- was it a vessel?

13 MR. KAPLAN: The scow is a vessel.

14 JUSTICE STEVENS: The scow was.

15 MR. KAPLAN: The scow is absolutely a vessel.

16 JUSTICE SCALIA: Oh, that's not even close.

17 MR. KAPLAN: Not even --

18 JUSTICE SCALIA: I mean, it carries all this
19 goop somewhere else to -- to dump it. Right?

20 MR. KAPLAN: They had to move from here to
21 somewhere else. That's --

22 JUSTICE GINSBURG: Then explain to me why --

23 MR. KAPLAN: So did the Super -- sorry.

24 JUSTICE GINSBURG: -- why it wasn't the vessel
25 that counts. If it's a vessel and it is in fact the place

1 where he was injured and it was moving, it -- that would
2 be an easy case, but somehow you have to deal with the
3 Super Scoop, and I'm wondering why.

4 MR. KAPLAN: Well, the Super Scoop was not
5 moving at that moment, but the scow was moving --

6 JUSTICE GINSBURG: Well, why don't you just say
7 the scow was a vessel? End of case. The scow was a
8 vessel. It was moving. That's where he was injured.

9 MR. KAPLAN: I would take that, Your Honor, but
10 I would like to extend it to get a status -- a statement
11 from this Court so that we can remove the indecisions, the
12 silly tests that the lower courts have been creating for
13 what is a vessel and what is not a vessel.

14 JUSTICE STEVENS: Thank you, Mr. Kaplan. Thank
15 you. Your time is up.

16 MR. KAPLAN: Oh, my. Thank you.

17 JUSTICE STEVENS: Ms. Blatt.

18 ORAL ARGUMENT OF LISA S. BLATT

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

21 MS. BLATT: Thank you, Justice Stevens, and may
22 it please the Court:

23 Justice Ginsburg, I take it the reason that the
24 scow was not relied on is because the petitioner worked
25 99.9 percent of his time on the Super Scoop and petitioner

1 never made the argument that he had a connection to the
2 scow.

3 But this case, the dredge, the Super Scoop, was
4 a vessel in navigation and it's an easy case under both
5 standards because it remained in service as a means of
6 carrying its workers and equipment as it moved along the
7 Boston Harbor.

8 JUSTICE KENNEDY: Do you think we need to use
9 the word practical or practically in section 3?

10 MS. BLATT: Yes. I mean, you've -- you've read
11 it in into Evansville and Cope, the -- the drydock case,
12 but it's -- it's basically referring to any mobile
13 watercraft that is practically capable of moving either
14 cargo or people.

15 JUSTICE SCALIA: Why is that reading anything
16 in? I mean, do -- do you think if -- if you were not
17 practically capable, you would be capable?

18 MS. BLATT: I don't -- I don't think it much --

19 JUSTICE SCALIA: I don't regard that as a
20 reading in at all. I mean, capable means capable. You're
21 either capable or not. If you practically can't be moved,
22 your not capable.

23 MS. BLATT: That's fine, and I think -- like I
24 said, this is an easy case. I could address some of the
25 -- the --

1 JUSTICE BREYER: Why -- why is this an easy
2 case? Because, after all, the First Circuit is struggling
3 with the same problem and they came to the conclusion, use
4 section 3. That's fine. But you know that the garage
5 door is not a vessel, and you also know that Jimmy's
6 Harborside is not a vessel. And you also know that
7 Justice Scalia's beached scow or something is not a
8 vessel. And I take it nor is a vessel a scow that's tied
9 up for 364 days of the year and acts as a picnic place and
10 one day they take it out to sea and -- because they want
11 to move it across the harbor. I guess that isn't a
12 vessel. Is it? Or maybe it is. So why is this so easy?
13 Because the First Circuit --

14 MS. BLATT: Justice Breyer, the --

15 JUSTICE BREYER: -- had a test, tries to make
16 those distinctions.

17 MS. BLATT: Right. The -- I respectfully
18 disagree. The First Circuit was way off base. It did not
19 use section 3 of title 1.

20 JUSTICE BREYER: All right. Let's say it's
21 wrong about that.

22 MS. BLATT: What it did is it --

23 JUSTICE BREYER: Now let's take section 3.

24 MS. BLATT: Okay, let's -- okay, let's go from
25 there.

1 JUSTICE BREYER: And taking section 3, it seems
2 to me, we have the same problems.

3 MS. BLATT: Let me -- let me answer your
4 question.

5 JUSTICE BREYER: And I'd like to know your
6 answer and you just said to Scalia what I thought --
7 Justice Scalia that I thought what was an answer isn't
8 because I thought that word practical, as co-counsel
9 recommended, has a rather specialized meaning where we get
10 rid of a lot of these. Now you're saying no, it doesn't.

11 MS. BLATT: I think the -- the -- you look at
12 the physical characteristics and the surrounding
13 circumstances of any type of watercraft, and if it's out
14 there moving, I -- I think that really is an easy case.
15 What I think is bothering -- what was bothering the First
16 Circuit is that this vessel clearly has a stationary
17 purpose. It had two essential and indispensable purposes,
18 one of which was stationary and one of which was a mobile
19 barge.

20 The types of cases that raise problems under 1
21 U.S.C. 3 is you have things that meet the definition of
22 vessel. The Coast Guard regulates them as vessels, but if
23 they have no function to transport people or things -- and
24 the best example is our country's battleships. They're
25 basically retired vessels. They're museums. And there

1 are some casino boats that function the same way. They
2 have no transportation function. They've been withdrawn
3 from navigation.

4 If you want a legal standard for what in
5 navigation is it's this. It's what the Court said in
6 Chandris, which is it's the status of the ship, and that
7 means does it have some -- is it still servicing as a
8 ship.

9 JUSTICE SCALIA: But that goes to in
10 navigation --

11 MS. BLATT: That's correct.

12 JUSTICE SCALIA: -- not to whether it's a vessel
13 or not. It is still a vessel even if it's beached up on
14 land so long as it is capable of -- of floating. It's
15 just not in navigation, isn't it?

16 MS. BLATT: I agree. The only types of cases
17 where a vessel would lose its status as a vessel if it's
18 been basically -- there -- there are basically two kinds
19 of cases where the casino boats or the museums or hotels
20 have lost their status. And there are basically -- there
21 are two examples. They're boats in a moat. They've been
22 basically landlocked in through concrete or landfilled and
23 they can't go anywhere. And the other one that's --
24 that's equally as common is pipes and stuff have been
25 driven through the hull of the ship, and they're not

1 practically capable of transporting anything. They'd have
2 to be overhauled.

3 JUSTICE BREYER: Your -- your view of the word
4 in navigation does all the work here. And so a -- a
5 concert ship, which exists, which say is docked at a dock
6 for, let's say, 300 days of the year or maybe 360, and
7 those other 5 days they -- they move it from one town to
8 the next town where it stays for another 4 months, that is
9 in navigation or not?

10 MS. BLATT: We think it's in navigation. If you
11 have a --

12 JUSTICE BREYER: All right. So then --

13 MS. BLATT: If it's --

14 JUSTICE BREYER: -- the concert master and the
15 -- the -- all the orchestra players and everyone else are
16 covered by the Jones Act even though, by the way, none of
17 them has ever moved whatsoever.

18 MS. BLATT: No, no. That's not correct. It
19 just means it might be a vessel in navigation. You have
20 cruise ships, military ships, pleasure crafts that sit all
21 the time, some for years, but they're still ready for
22 another voyage when and if they're needed. Those are
23 still in navigation. Now, if you have --

24 JUSTICE BREYER: Well, if that's so, that's --

25 MS. BLATT: I'm going to answer your question on

1 the seaman. If you've got a worker that never goes to sea
2 on a vessel in navigation, the place to deal with that is
3 not by saying it's not a vessel or not that it's not in
4 navigation. But this Court emphasized in the Harbor Tug
5 and Barge case, as well as the Chandris case, that there
6 has to be a substantial connection not only in duration
7 but also with respect to nature. And the Court in Harbor
8 Tug said that -- that inquiry will concentrate on whether
9 the employee's duties take him to sea.

10 JUSTICE SOUTER: Okay. In the case of the steam
11 shovel operator on the dredge, do we say that -- that he
12 contributes toward that function because it can't move
13 unless he dredges first, so that the -- the whole object
14 of moving across the harbor to dredge includes the -- the
15 dredging part?

16 MS. BLATT: No.

17 JUSTICE SOUTER: Is that the way we do it?

18 MS. BLATT: There's -- there's a decision in
19 McDermott v. Wilander that expressly holds that the worker
20 need not aid in the navigation of the ship.

21 JUSTICE SOUTER: That's right.

22 MS. BLATT: Bartenders, croupiers, waitresses,
23 et cetera on cruise ships are all seamen. That's just the
24 holding of McDermott v. Wilander.

25 Now, there's still a separate question of

1 whether they're exposed to the perils of sea.

2 JUSTICE SOUTER: So as long as -- as long as

3 somebody is -- is engaged in a navigation --

4 MS. BLATT: In the ship's work --

5 JUSTICE SOUTER: -- function, everybody else

6 comes --

7 MS. BLATT: -- whether that work is gambling

8 or --

9 JUSTICE SOUTER: Okay.

10 JUSTICE BREYER: But now we have, in my concert

11 ship, the concert master and the whole orchestra covered

12 by the Jones Act even if none of them, by the way, has

13 ever been even to sea on that day when -- they take the

14 train.

15 MS. BLATT: Well, I just said that they may not

16 be covered, but they --

17 JUSTICE BREYER: Because?

18 MS. BLATT: They may not be covered --

19 JUSTICE BREYER: Because?

20 MS. BLATT: They may not be covered if they fail

21 the last requirement --

22 JUSTICE BREYER: But it says --

23 MS. BLATT: -- of Chandris.

24 JUSTICE BREYER: -- in terms of both its

25 duration and its nature, i.e., a connection to a vessel --

1 MS. BLATT: Vessel in navigation.

2 JUSTICE BREYER: -- in navigation.

3 MS. BLATT: Right, and I -- Harbor Tug v. Barge,
4 which is a later opinion, explains that that test will
5 look at whether the employee's duties take him or her to
6 sea.

7 Now, in this case the dredges operate not only
8 -- only on the water, but they're out there usually away
9 from shore and are engaged in regular movement over
10 navigable waters. And the workers on that dredge, such as
11 petitioner, are subject to the traditional perils of
12 navigation which include not only collision with ships,
13 but even capsizing.

14 Barges such as dredges are particularly
15 susceptible to capsizing because their distance between
16 the deck of the barge and the water, which is known as the
17 freeboard, is low. In this case it was only 5 feet, and
18 they have a high center of gravity because of those
19 derricks or cranes that are holding the bucket ship. And
20 if it's operating in poor weather or for some reason it's
21 overloaded, they can tip over and you have a marine
22 incident or even casualties. And this worker was exposed
23 to the perils of navigation like other traditional seamen.

24 And this Court -- we think it's pretty telling
25 that the Court basically in two decisions has resolved

1 this case. You have already used 1 U.S.C. 3 in the Norton
2 case in defining what is a vessel for purposes of the
3 seamen exclusion in the Longshore Act. And then in the
4 Ellis decision, this Court has already held that a dredge,
5 including the scows that were accompanying that dredge,
6 were vessels for purposes of 1 U.S.C. 3 and that the
7 workers were seamen and that they were basically called
8 upon to perform the duties, more or less, of ordinary
9 seamen. And every other court that had looked at the
10 issue and passed on it had equally held that dredges were
11 vessels for a variety of maritime purposes. That was
12 seamen's liens, limitation of liability, and -- and the
13 overtime -- overtime laws in the Ellis case.

14 JUSTICE O'CONNOR: Ms. Blatt, the -- there was a
15 brief filed by Signal I think that argues that a Jones Act
16 vessel has to provide food, care and lodging to be
17 covered.

18 MS. BLATT: Right. With due respect to the
19 author, I think that approach is novel, it's radical, and
20 it's unsubstantiated. Never has the definition of vessel
21 turned on whether the watercraft had sleeping quarters.

22 JUSTICE KENNEDY: Are there problems in
23 computing maintenance and cure in a case like this one?

24 MS. BLATT: It's usually governed by the
25 collective bargaining agreement. I think it's something

1 like \$40 a day, and this petitioner was a union laborer.
2 And it's -- it's usually governed --

3 JUSTICE KENNEDY: Suppose it were just left it
4 up to the law. Are there problems in computing what cure
5 and maintenance --

6 MS. BLATT: There used to be, but in -- there
7 used to be a debate, which I think most of the cases the
8 Signal brief is relying on, in how long maintenance and
9 cure goes for and it was a rather kind of arcane, tricky
10 thing, but basically this Court resolved it in 1930. It
11 goes to maximum cure. So the seamen can no longer be
12 cured. And there used to be a debate about should it just
13 go to the extent of the wage contract or to some longer
14 point, and the Court resolved that.

15 But there is no case that has ever even
16 discussed the fact that a vessel turns on whether it has
17 sleeping quarters. And we think that brief is also
18 fatally undermined by the decision in *Ellis* and all the --
19 decision in *Ellis* already holding that vessels -- or the
20 workers were seamen, and there was never been a discussion
21 in those dredge cases about whether they had sleeping
22 quarters. Several of those cases -- the most oft-cited
23 one is that *Saylor v. Taylor* case out of the Fourth
24 Circuit, was a maritime lien case, and those are exactly
25 the type of workers that this Court in *McDermott* said were

1 seamen who were intended to be covered under the Jones
2 Act.

3 If there are no questions, we would ask that the
4 First Circuit's decision be reversed.

5 JUSTICE STEVENS: Thank you, Ms. Blatt.

6 Mr. Connelly.

7 ORAL ARGUMENT OF FREDERICK E. CONNELLY, JR.

8 ON BEHALF OF THE RESPONDENT

9 MR. CONNELLY: Justice Stevens, and may it
10 please the Court:

11 This Court in Chandris and in Harbor Tug stated
12 the basic point of trying to be -- to separate lien-based
13 employees from sea-based employees. This Court also
14 stated that was Congress' goal in passing the Jones Act.
15 The Court wrote: the Jones Act remedy is reserved for
16 employees whose work regularly exposes them to the special
17 hazards and disadvantages to which they who go down to the
18 sea in ships are subjected. The First Circuit's ruling is
19 much more likely to get to that result. The goal that
20 this Court stated was Congress' goal then is section --
21 excuse me -- 1 U.S.C., section 3.

22 Justice O'Connor, your first question had to do
23 with the casino boats, and that is a point that I was
24 going to raise. Those casino boats are traditional
25 vessels plying the rivers and used mostly in the midwest

1 and -- and the Great Lakes. Those States have recently
2 over the last 3 or 4 years changed their law. The law had
3 been that they had to go up to -- out into navigation.
4 They've now changed them and said, no, you must stay
5 dockside. All they are is tied up dockside. They can be
6 untied and moved out at any time.

7 The cases that -- and you're probably going to
8 have some before you -- are dealing with dealers and
9 waiters and waitresses to go aboard the casino boat and
10 maybe fall down in the kitchen or something and are
11 injured. They have never been on the boat while it was
12 moved and it hasn't moved for the last several years.

13 JUSTICE O'CONNOR: Well, that might affect the
14 decision of whether they are seamen covered under the
15 Jones Act. It might still be a vessel.

16 MR. CONNELLY: Well --

17 JUSTICE O'CONNOR: But there may be other
18 aspects of the test that aren't met --

19 MR. CONNELLY: But breaking it down --

20 JUSTICE O'CONNOR: -- when the thing is tied up.

21 MR. CONNELLY: Breaking it down, Your Honor, if
22 the petitioner has his way, those tests are met. The
23 first test is whether it's a vessel. It is a vessel.
24 Second test, whether it's in navigation. The Government
25 has just told you, and it states in its brief, any vessel

1 that had any transportation purpose at all that is still
2 not -- unless it's mothballed -- and I think they said
3 today either pipes driven through it or in cement -- is a
4 vessel in navigation. So it is a vessel in navigation.

5 We know that the --

6 JUSTICE O'CONNOR: I think it might be a vessel,
7 but probably not in navigation while it's tied up or in
8 mothballs.

9 MR. CONNELLY: Again, Your Honor, all it is is
10 tied to the pier. The Government has taken the position,
11 as has petitioner, in their briefs and here today that
12 it's still in navigation if it can be used.

13 JUSTICE SCALIA: Yes, but I think what the
14 Government has said is that though it's in navigation, we
15 have a case that says that the -- that the seaman's
16 connection to the ship has to be related to the
17 functioning of the ship in navigation. He doesn't have to
18 navigate it, but he has to be working at what the ship
19 does in the course of its navigation, and a dredge
20 operator does that.

21 MR. CONNELLY: Well, I don't think a dredge
22 operator does that any more than the waiter on the casino.
23 The dredge operator -- the dredge is there to do
24 construction work. It is there to dredge. The casino is
25 there to have people gamble and serve them drinks.

1 JUSTICE SOUTER: But isn't -- isn't that the
2 point? The dredge is there necessarily to move. The
3 casino is not there necessarily to move.

4 MR. CONNELLY: Well, it is our position -- and
5 as stated by some of the First Circuit -- that the
6 movement of the dredge was incidental. Once --

7 JUSTICE BREYER: Should we clarify that?
8 Because I don't read the cases saying what Justice Scalia
9 just said or what you -- what it says is that a seaman
10 must have a connection to a substantial -- in terms of
11 duration and nature connection to a vessel in navigation.

12 MR. CONNELLY: Correct.

13 JUSTICE BREYER: Obviously, a croupier has such
14 a connection.

15 MR. CONNELLY: Correct, Your Honor.

16 JUSTICE BREYER: It doesn't say anything about
17 being connected to the navigating part.

18 MR. CONNELLY: That's correct, and this Court
19 handled that in Wilander, Your Honor, that it said in --

20 JUSTICE SCALIA: Not to the navigating part but
21 to what the vessel is doing in the course of its being in
22 navigation.

23 MR. CONNELLY: If the term, Your Honor, in
24 navigation, had the bite that I think it should have, then
25 we may not be here today at all. The First Circuit was

1 actually looking at the actual transportation function,
2 assuming that it had to be into navigation. What the --
3 what the petitioner wants is 1 U.S.C., section 3 which
4 looks at theoretical transportation, a mere capability.

5 And Your Honor, I understand what you said,
6 Justice Scalia, that to you, they're the same, practical
7 capability or capability. But to the petitioner and the
8 Government, they are far different. In both of their
9 briefs, they have said that without the Evansville change
10 in the language of the statute which adds practical
11 capability, both have agreed that it is overly inclusive a
12 statute, 1 U.S.C., section 3. It includes everything and
13 including Justice Breyer's garage door.

14 JUSTICE GINSBURG: But as Mr. Kaplan pointed
15 out, all -- the fact that something is a vessel doesn't
16 mean there's Jones Act coverage, and I think Mr. Kaplan
17 was getting to the perils of the sea. Someone who's
18 working on a boat that is not in the water day in and day
19 out is never exposed to the perils of the sea.

20 MR. CONNELLY: Well, Your Honor, the perils of
21 the sea, which this Court discussed at length in the Papai
22 case, we -- we say that -- that is further evidence that
23 Mr. Stewart is not entitled to Jones Act remedies. Mr.
24 Stewart was on a construction site. It happened to be a
25 work platform in site of land. He was never more than 500

1 yards off the coast. The dangers that he was up against
2 were more akin to that of a construction worker or, at the
3 very least, a harbor worker or a stevedore. They were not
4 the same perils that are normally faced by a true seaman.
5 Now --

6 JUSTICE GINSBURG: One peril was a collision
7 with another vessel, and that's exactly what happened
8 here.

9 MR. CONNELLY: We disagree with that, Your
10 Honor. This was a situation where the Super Scoop was --
11 was moored. It was anchored and stationary, again as a
12 stationary work platform. The scow was just being brought
13 from one side to the other alongside -- attached to it at
14 all time by -- by cables and by the crane. The -- the --
15 he got jostled and he fell. No different than harbor
16 workers and stevedores face everyday when they're
17 unloading ships and working on harbors.

18 JUSTICE KENNEDY: Suppose there had been --
19 suppose there had been very rough water --

20 MR. CONNELLY: They would have sent everyone
21 home.

22 JUSTICE KENNEDY: -- and -- and the crane
23 operator was the -- was operating it and the water came
24 over the freeboard and it capsized. That's -- that would
25 be the perils of the sea, wouldn't it?

1 the middle of a large city. There was no major danger of
2 isolation. That -- the Super Scoop was inspected
3 regularly by the State, Federal, and Government officials
4 and by the general contractor on the job. There was no
5 isolation. All of the perils that have been listed by --

6 JUSTICE KENNEDY: And -- and by the Coast Guard.

7 MR. CONNELLY: The Coast Guard also. I'm not
8 sure they went out on a regular basis, but they did
9 inspect the -- the Super Scoop at -- at some point.
10 There's no question about that.

11 This Court --

12 JUSTICE STEVENS: You're not contending that
13 anything that happens in a harbor is not exposed to the
14 perils of the sea, are you?

15 MR. CONNELLY: Oh, absolutely not, Your Honor.
16 This Court in Cope and earlier cases has long equated a
17 vessel with transportation. That's what the First Circuit
18 did. They -- they needed a bright line. They chose a
19 bright line, and the bright line was transportation. Is
20 the structure primarily engaged in transportation or
21 commerce? And navigation, transportation, and commerce
22 are all intermixed, and -- and the definitions include
23 each other. And they found that it was not primarily
24 engaged in transportation. It was primarily a work
25 platform doing construction.

1 JUSTICE GINSBURG: But how do you -- how can you
2 possibly describe as a bright line test anything that says
3 you have to identify the primary function? Plus, even if
4 it's not its primary function, if it happens to be moving
5 at the time of the accident, then there's coverage. That
6 doesn't seem to me very bright line.

7 MR. CONNELLY: Well, Your Honor, what it is, I
8 believe, is a bright line test with an exception. And the
9 Stewart case talked about the DiGiovanni exception, which
10 falls very closely to -- to what Justice Stevens wrote in
11 his concurring opinion in the Chandris case, that it is
12 unfair that somebody who was actually injured while a -- a
13 vessel or -- or structure is in actual navigation does not
14 get at least a second bite at the apple and that that
15 person cannot be -- said to be a Jones Act seaman.

16 JUSTICE GINSBURG: Even though the identical
17 accident happens to his buddy 10 minutes before when the
18 vessel isn't moving.

19 MR. CONNELLY: Well, Your Honor, at no time
20 during the 1 and a half years that Mr. Stewart was in the
21 harbor, as far as we know from the record, was the Super
22 Scoop in transportation. The incidental movement of -- of
23 pulling forward a few feet with its anchors is not
24 navigation or transport -- transportation. The First
25 Circuit stated that the movement of the scow was both

1 immaterial because, as the Government has already
2 admitted, he wasn't tied to the scow. His -- his time was
3 spent on the Super Scoop, but also incidental, Your Honor,
4 because it was just slight movement along the site. It
5 wasn't transportation or navigation.

6 At no point -- and -- and the petitioner has put
7 their spin on this that -- stating that Mr. Stewart every
8 day he was out there moved in and out of coverage. That's
9 not true. He was never in Jones Act coverage.

10 And Your Honor --

11 JUSTICE SCALIA: I -- I guess I could agree with
12 you if -- if I believed that I had to look to the primary
13 purpose, whether the primary purpose of the vessel was
14 transportation. But what -- what do you do about gambling
15 ships that, you know, they -- they sail out beyond the 2-
16 mile limit and then come right back to where they left?
17 Now, people get on board not to get transported. They get
18 on board to gamble. And the purpose of the ship, the
19 primary purpose of the ship, is gambling. You think that
20 -- that -- the -- the seamen who -- who are on that ship,
21 which regularly goes out beyond the 2-mile limit, you
22 think that they're -- that they're not covered by the
23 Jones Act?

24 MR. CONNELLY: I think in that situation, Your
25 Honor, it's -- it's a closer call, that they --

1 JUSTICE SCALIA: I don't think it's close at
2 all. I think they're obviously covered by the Jones Act.

3 MR. CONNELLY: That is a traditional trip --
4 ship and those people are engaged in a form of
5 transport --

6 JUSTICE SCALIA: But -- but that's not the
7 primary purpose of -- of the ship, just as the primary
8 purpose of this scow is -- of -- of this dredge is not
9 transportation.

10 MR. CONNELLY: In that situation, Your Honor, it
11 would be -- it would be a primary purpose, though, that
12 transporting the people who happen to be gambling --

13 JUSTICE SCALIA: Oh, a primary purpose? Now,
14 you're getting a little fuzzy there. I thought you said
15 the primary purpose.

16 MR. CONNELLY: Well, in the First Circuit --

17 JUSTICE SCALIA: It has to be a primary purpose.

18 MR. CONNELLY: Well, in the Manuel court, the
19 Fifth Circuit actually uses the term, a primary purpose.

20 JUSTICE SCALIA: A. Oh.

21 MR. CONNELLY: And -- and I think -- and to a
22 degree that --

23 JUSTICE SCALIA: And you think that's not fuzzy.
24 (Laughter.)

25 MR. CONNELLY: It's an -- it's an oxymoron, Your

1 Honor.

2 But what -- what the First Circuit was doing in
3 -- in the Stewart case is -- is similar to what this Court
4 did in Chandris. It was looking at a temporal view. A
5 worker -- and the temporal view used by this Court in
6 Chandris was looking at what the worker was doing. What
7 were his duties? He isn't going to be denied Jones Act
8 coverage because he happened to be an office worker 2
9 months before if his duties had changed and he was now a
10 Jones Act seaman, nor if he fell in the office, after he
11 had been reassigned to the office, was he going to gain
12 Jones Act seaman status just because he spent the last 2
13 years on the vessel.

14 That is what the First Circuit has done in terms
15 of the vessel as well, not just the work but in terms of
16 the vessel. Do not look at what this vessel did in the
17 past. Do not look at what it did -- might do in the -- in
18 the future. It's transportation from California through
19 the Panama Canal up the east coast is immaterial. You
20 should look at the worker who is claiming Jones Act
21 status, his relationship to the structure and what the
22 structure's purpose was and business was during that
23 relationship. During the 1 and a half years that he was
24 associated with it, it wasn't transporting anything. It
25 was used as a -- a work platform only, only a structure,

1 and it wasn't transporting anything during that time.

2 The same thing with the casino boats, these
3 individuals who go upon the casinos as a waitress and are
4 never -- never leave the port, never leave the dock
5 shouldn't be entitled to the special protections of the
6 Jones Act. They face none of the perils of -- of the sea
7 or of -- of perils of -- of navigation.

8 JUSTICE GINSBURG: There's a difference to this
9 extent, would you agree, that something that's just tied
10 up to the dock and never moves is different from something
11 that is actually in the water and whether you call it
12 transportation, it is moving? It has to move to engage in
13 the construction of this tunnel.

14 MR. CONNELLY: Well, Your Honor, this Court has
15 decided, I believe it was in *Chandris*, that a -- a seaman
16 doesn't lose his seaman status just because the vessel
17 he's assigned to is now in -- in port. They wanted --
18 they didn't want a person to go in and out too many --

19 JUSTICE GINSBURG: Well, I'm just -- let's focus
20 on what is a vessel because someone -- it may be a vessel
21 but the injured person may not be a seaman. Those are two
22 different things. This is only the first step. So when
23 you're bringing in what the worker does, whether it's a
24 croupier or whatever, the only question that we are
25 considering is, is this dredge a vessel? We're not

1 involved with the question of whether the worker is a
2 seaman unless we pass that basic threshold.

3 MR. CONNELLY: That's correct, Your Honor, but
4 of course, the ultimate issue the Court is trying to
5 arrive at is whether or not Mr. Stewart is a Jones Act
6 seaman. And this Court has held for him to be a Jones Act
7 seaman, it must be a vessel in navigation. I don't think
8 that that can be separated, that just looking at a vessel.
9 1 U.S.C., section 3, which the petitioner wishes, of
10 course, everything -- everything that floats that is
11 capable of transportation is -- is a vessel. The First
12 Circuit has -- has used a much more narrow definition but
13 focusing on the purpose and primary use of the structure
14 because it is trying to get to where this Court was trying
15 to get. Is it a vessel in navigation?

16 JUSTICE SCALIA: Is it -- is it the vessel
17 that's the problem? Why -- why do you focus on the
18 vessel? It seems to me most of your argument has gone to
19 whether it's in navigation. Can you be a vessel that is
20 not in navigation?

21 MR. CONNELLY: Yes, Your Honor.

22 JUSTICE SCALIA: Of course, you can or you
23 wouldn't have the -- the combination of the two terms
24 appearing anywhere. So why isn't the problem here not
25 whether it's a vessel but whether it's in navigation?

1 MR. CONNELLY: Well, again, Your Honor, if -- if
2 in navigation means what it should mean, which is an
3 instrument for transportation or commerce over navigable
4 waters, and not simply as the petitioner and the
5 Government want it to mean that anything that once might
6 have been in navigable waters and stays in navigable
7 waters and isn't mothballed is still in navigation -- if
8 it means what it should mean, then that's something I
9 think the First Circuit is -- was trying to get to anyway.
10 They -- they were looking at it in terms of vessel status,
11 vessel in navigation versus just in navigation. They --
12 they were trying to get there and that's why they used
13 what is really a -- a temporal look and looked at what was
14 the business use.

15 JUSTICE O'CONNOR: Well, exactly. And -- and in
16 Chandris, this Court rejected the snapshot approach to
17 determining what's a vessel and the First Circuit seemed
18 to go back to that. And certainly what the First Circuit
19 did seems in serious tension with this Court's cases. It
20 just didn't follow the same line that we had outlined.

21 MR. CONNELLY: The First Circuit does -- the
22 First Circuit rule, Your Honor, in DiGiovanni and Fall and
23 Stewart does have a snapshot exception.

24 JUSTICE O'CONNOR: Yes.

25 MR. CONNELLY: There's the main rule which has a

1 bright line --

2 JUSTICE O'CONNOR: Right, and that was rejected
3 by this Court in Chandris. So I -- I think there's a
4 problem here.

5 MR. CONNELLY: Well, Your Honor, there -- there
6 are always -- and this is answering Justice Ginsburg's
7 question earlier as well. There are always going to be
8 difficult situations where some people, doing the exact
9 same work, using the same equipment on the same structure,
10 some are covered and some are not, a situation where one
11 has the requisite connection 30 or 40 percent to a vessel,
12 the other person doing the same work next to him only has
13 10 percent. One is covered.

14 JUSTICE O'CONNOR: Yes, but it might be much
15 simpler to rely on 1 U.S. Code, section 3 and our -- our
16 definition, as we've described it there, and then deal
17 with other situations within the framework of the
18 definition of seaman and the other issues that arise. And
19 it seems like the First Circuit went backwards from
20 Chandris back to Giovanni which basically had been
21 rejected. So that's the concern.

22 MR. CONNELLY: Your Honor, again, I -- I think
23 that if 1 U.S.C., section 3 is adopted, then every vessel
24 capable --

25 JUSTICE O'CONNOR: Congress adopted that.

1 MR. CONNELLY: Well, I don't -- I don't agree,
2 Your Honor. The way -- the way we look at the
3 congressional intent -- this Court has already decided in
4 -- in several cases that Congress left it to the court to
5 decide which persons are -- should be granted Jones Act
6 seaman status. This is what the Court has said. Why then
7 would the Congress in -- in the same statutes have sort of
8 handcuffed the Court by saying it's for you to decide
9 who's a Jones Act seaman and who's entitled to those
10 special protections, but we're going to handcuff you and
11 -- and say this is what you have to decide as far as
12 vessel is concerned?

13 1 U.S.C., section 3 was not followed. I should
14 also point out that the petitioner is a recent convert to
15 this position, and it -- it hasn't been followed in the
16 circuits at all. There isn't a lot of cases out there
17 where a lot of circuit judges have stated section 3 should
18 be the definition for the Jones Act.

19 JUSTICE BREYER: If -- if you go -- I thought
20 vessel -- the word vessel appears in our cases. It
21 doesn't appear in the Jones Act. Am I right or not about
22 that?

23 MR. CONNELLY: It does not appear in the Jones
24 Act --

25 JUSTICE BREYER: All right. So we have a degree

1 of freedom on this. But -- but the -- the question then
2 is, is it -- how -- I'm getting the impression from you
3 and -- and from the SG that it's rather deeply embedded in
4 the law, if we start reading the Fifth Circuit cases, that
5 if we define X as a vessel, automatically it is a vessel
6 in navigation, that the cases have said the word in
7 navigation mean nothing, with one exception. The
8 exception is if you actually have like a physical cemented
9 connection to the land so they can't escape. Otherwise,
10 if it's just tied up at a dock, even if it never goes to
11 sea, those words, in navigation, have no meaning. If it's
12 a vessel, it's a vessel in navigation. If it's my garage
13 door, my garage door, which can float, is a vessel in
14 navigation.

15 Now, how accurate is that assumption I'm now
16 making? What would I read in the law? Is that definition
17 of in navigation as meaning virtually nothing really
18 embedded in the law?

19 MR. CONNELLY: It is pursuant to what -- the
20 petitioner and the Government's view.

21 JUSTICE BREYER: I know it is but what is your
22 view?

23 MR. CONNELLY: My view is that it shouldn't be,
24 that it should have some bite to it. It should mean, as
25 -- as I stated before, an instrument of commerce or

1 transportation over navigable waters. But that's not what
2 it has come to mean in a lot of the circuits below. It
3 has come to mean something that's just simply in navigable
4 waters no matter how many years it has gone without --

5 JUSTICE BREYER: Well, would it help? Suppose
6 we were to say it was -- had to be capable, at least, of
7 having a captain and crew?

8 MR. CONNELLY: I have never thought of that,
9 Your Honor.

10 JUSTICE BREYER: Then we better not do anything
11 for the first time.

12 (Laughter.)

13 MR. CONNELLY: Your Honor, I think in that in
14 that situation, there are -- there can be vessels involved
15 with transportation, getting back to the Cope case and
16 other cases, where there -- it's -- it's a barge being
17 towed, but it's transporting things. We're not disputing
18 that. I don't think it needs to have a captain and crew
19 necessarily to be a -- considered a vessel in navigation.

20 But you hit the nail on the head, Your Honor,
21 and that's -- that's where the First Circuit was befuddled
22 in -- in trying to come up with a regional -- reasonable
23 test because they're dealing with this situation where it
24 seemed like everything is a vessel in navigation. And
25 yet, that doesn't serve Congress' intent of only persons

1 capable because the Court saw that in Evansville the
2 wharfboat, which they determined was not a vessel, even
3 though again not dealing with the Jones Act, it was
4 capable of transportation, but it wasn't practically
5 capable of transportation. So the --

6 JUSTICE GINSBURG: Was the Court then --

7 MR. CONNELLY: -- the Court has decided --

8 JUSTICE GINSBURG: -- just construing --

9 MR. CONNELLY: -- not to follow section 3.

10 JUSTICE GINSBURG: -- just construing instead of
11 not following, but say by capable, Congress must mean
12 practically capable.

13 MR. CONNELLY: Your Honor -- and I realize that
14 is what Justice Scalia said earlier. The position of the
15 petitioner, as he stated as he was standing here not too
16 many minutes ago, was that they seek to have the Court
17 employ 1 U.S.C., section 3, not the Evansville change to
18 that section. They -- they see it as quite different and
19 it's in both of their briefs, that Evansville did change 1
20 U.S.C., section 3. The petitioner's position is that this
21 Court is bound by -- to follow 1 U.S.C., section 3 because
22 Congress says so.

23 It is our position that they're not so bound.
24 If you're bound -- if you're not bound, why take a faulty
25 definition such as section 3 and try to change it a little

1 bit? You're -- you're free to as -- as you are, to
2 determine who is a Jones Act seaman. You're free to
3 determine what is a vessel in navigation or a vessel
4 pertaining to the -- the Jones Act.

5 1 U.S.C., section 3 was never referenced in the
6 Longshore Act. Congress at that time, many years before
7 and many years after, has passed many statutes in which
8 vessel is defined. Sometimes they reference section 3;
9 other times they write in a definition. Sometimes it's
10 similar to section 3, sometimes quite different. In this
11 case -- for the Longshore Act, they decided to leave it to
12 the courts.

13 The Jones Act was passed in 1920. Its
14 predecessor was the act of 1915. That act did have a
15 definition of vessel that was very restrictive and
16 actually talked about actual navigation. In 1920, the
17 Merchant Marine Act was passed and it -- that portion of
18 it had a very large definition, which was already
19 discussed earlier, the Shipping Act definition. The Jones
20 Act didn't adopt that one and it didn't adopt the one in
21 1915.

22 The -- the Longshore and Harbor Workers Act was
23 passed in 1927. Certainly by that point they knew that
24 they had just jettisoned two definitions 7 years before.
25 They chose again to leave it to the courts.

1 In 1972 and again in 1984, there were
2 considerable amendments that Congress did to the Longshore
3 Act. At that time, they certainly knew -- and there's
4 always been heavy -- heavy lobbying going on in Congress
5 every time that they try to touch the Longshore Act or --
6 or the Jones Act. They knew by that point in time that
7 the circuits were not using section 3 as the definition
8 for Jones Act vessel. Again, they chose to leave it to
9 the courts. They did not intercede and then reference
10 section 3 or incorporate a definition like it or
11 something. They again chose not to.

12 In 1920, section 3 was certainly not the only
13 definition of vessel. Benedict on Admiralty, which this
14 Court has cited several times, which the petitioner has
15 cited, had a completely different definition of -- of
16 vessel, and that could have been the one that Congress had
17 in mind.

18 I realize it's always dangerous to mention the
19 Congressional Record, but most of the people who spoke in
20 1920 and again in -- mainly in 1927 were discussing
21 traditional vessels and vessels on a voyage. If they had
22 true seamen in mind, they probably had more of a
23 traditional vessel in mind.

24 Also looking at the record, when the House
25 wanted to include everybody, all seamen, into the

1 Longshore Act, they listed out various structures such as
2 dredges and barges. Obviously, a compromise was reached
3 with the Senate, and when the act was passed, they limited
4 it, not just seamen and -- and but only to masters and
5 members of crews of vessels. They limited it to that and
6 left it, of course, to the courts to decide who is
7 entitled to the Jones Act status.

8 If I may have a second, Your Honor.

9 The term vessel can and often has had a
10 different meaning for the Jones Act, which this Court has
11 stated is a vessel in navigation, than it does with the
12 Longshore and Harbor Workers Act. In his amicus brief
13 filed on behalf of the petitioner, Mr. Hillsman writes
14 that the lower court unanimously -- unanimously -- have
15 decided that the definition of vessel for purposes of the
16 Longshore Act is much, much more inclusive than it is for
17 the Jones Act, and it has worked perfectly fine.

18 Under the Longshore Act, most of the persons who
19 collect longshore benefits only have to show it's a
20 maritime nexus. There's no vessel requirement from almost
21 all of the claims under the Longshore Act.

22 Another point I wish to make is that both the
23 First Circuit and the petitioner talked about a bright
24 line test. The First Circuit, though, test is dealing
25 with actual transportation, the actual use in business of

1 the structure during the time that the person who is
2 claiming special status is associated with it.

3 More confusing is dealing with 1 U.S.C., section
4 3, which although bright is also very broad and would
5 include everything. Anything that floats or is capable of
6 floating would be included under that.

7 There are always going to be situations, no
8 matter what definition the Court comes up with -- always
9 situations where a person would have to be covered under
10 both acts, and I realize in the Chandris case, it was the
11 goal of the Court to say we'd like to make it clear as we
12 -- we can. We don't want people going in and out of Jones
13 Act status.

14 However, as this Court saw in Gizoni, a perfect
15 example -- in Gizoni, the person was a harbor worker.
16 This Court sent it back to the lower court saying -- the
17 lower court had said you're a harbor worker. That's your
18 label. You're in the harbor workers' union. You're not
19 entitled to -- for Jones Act status. This Court said no,
20 send it back, let's take another look. The person,
21 although a harbor worker, may have had the requisite
22 connections to a vessel in navigation to be able to claim
23 Jones Act seaman status. Obviously, in that situation,
24 which is a perfect example, the -- the employer would have
25 had to cover him under the Longshore Act and if -- if the

1 lower court changes or -- or the jury decides that he's a
2 Jones Act seaman, would have had to have covered him under
3 the Jones Act.

4 Professor Schoenbaum has said that the mutual
5 exclusivity of the two acts is really in theory only and
6 that there are always cases and will be dealing with the
7 brown water seamen and brown water employees, harbor
8 workers and longshoremen, where they're going to have to
9 be covered under both anyway.

10 Again, the First Circuit test, which does have
11 an exception to it, which it clearly is -- is a snapshot,
12 again to give someone another bite at the apple, which
13 this Court thought, at least in the concurring opinion in
14 Chandris, was a fair result, has that. But the test
15 itself is -- is broad. It -- it is a bright line and it
16 makes it clear, as this Court has stated in the past, that
17 unless there's a transportation function, it's not a
18 vessel in navigation.

19 Thank you.

20 JUSTICE STEVENS: Thank you, Mr. Connelly.

21 The case is submitted.

22 (Whereupon, at 12:02 p.m., the case in the
23 above-entitled matter was submitted.)

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